KMI ZEOLITE, INC., *ET AL.*

186 IBLA 154 Decided September 23, 2015

***Editor's Note: *KMI Zeolite, Inc., et.al. v. U.S. Dep't of the Interior*, No. 15-cv-02038 (D. Nev. filed Oct. 22, 2015) ***

United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
801 N. Quincy St., Suite 300
Arlington, VA 22203

KMI ZEOLITE, INC., *ET AL.*

IBLA 2013-157, *et al.* Decided September 23, 2015

Appeal from decisions of the Field Manager, Pahrump Field Office, Southern Nevada District, of the Bureau of Land Management (BLM), determining the appellants' liability for mineral materials trespass and realty trespass, and assessing damages. N-8152.

Affirmed in part, affirmed as modified in part, and reversed in part.

1. Trespass: Generally--Trespass: Joint and Several Liability

   With respect to trespass, parties acting in concert with each other while engaged in a joint effort or enterprise are jointly and severally liable.

2. Trespass: Generally--Trespass: Measure of Damages

   The measure of damages to be applied for mineral materials trespass is the measure of damages prescribed by the laws of the State in which the trespass is committed, unless a different rule is prescribed or authorized by Federal law.

3. Trespass: Willful Trespass

   The calculation of a realty trespass penalty depends on whether the violation is "nonwillful" or "knowing and willful."

4. Trespass: Joint and Several Liability--Trespass: Willful Trespass

   Parties are jointly and severally liable for willful trespass when, acting "in concert" with each other, they recklessly disregard the property boundaries between Federal and

private lands, and allow the project's activities to go beyond the private property, onto the Federal lands.

5. Trespass: Measure of Damages

Appellants challenging BLM's calculation of the amount of mineral materials taken in trespass bear the burden to show, by a preponderance of the evidence, error in the data, methodology, analysis, or conclusion of the experts upon which BLM relies.

APPEARANCES: Steven Gibbs, Esq., Law Offices of Steven G. Gibbs, Bakersfield, California, for KMI Zeolite, Inc.; Michael E. Stoberski, Esq. and Raymond E. McKay, Esq., Olson, Cannon, Gormley, Angulo & Stoberski, Las Vegas, Nevada, for R.A.M.M. Corporation; John M. Netzorg, Esq., Las Vegas, Nevada, for Galtar, LLC; Lucas A. Grower, Esq., Las Vegas, Nevada, for Robert E. Ford; John W. Steiger, Esq., Acting Regional Solicitor, Office of the Regional Solicitor, U.S. Department of the Interior, Salt Lake City, Utah, for BLM.

OPINION BY ADMINISTRATIVE JUDGE KALAVRITINOS

I. INTRODUCTION

On May 8, 2013, the Field Manager, Pahrump Field Office, Southern Nevada District, of the Bureau of Land Management (BLM), issued four decisions (2013 Decisions) in which he determined that mineral materials trespass and realty trespass violations had occurred, assessed damages for the violations, and required reclamation to BLM standards. Appellants from those four decisions, KMI Zeolite, Inc. (KMI), R.A.M.M. Corporation (RAMM), Galtar, LLC (Galtar), and Robert E. Ford (Ford), described by BLM as doing business as (d/b/a) Cadence Industries, LLC (Cadence),[1] each filed an appeal, which the Board docketed, respectively, as IBLA 2013-157, 2013-158, 2013-159, and 2013-164, and consolidated into one appeal. By order dated October 25, 2013, the Board granted appellants' unopposed petitions for stay.

[1] Ford d/b/a Cadence Decision at 1. Although we recognize that Ford was doing business as Cadence, when describing documents herein, we use the name either "Ford" or "Cadence," as used in those particular documents, in order to more specifically describe those documents. References to Ford d/b/a Cadence should not be viewed as implying that Ford alone controlled Cadence.

In its 2013 Decisions, BLM found that the appellants removed 463,885 cubic yards (cy) of mineral materials from public lands, and excavated 38.5 acres of public lands, and partially filled the excavation with tailings, without authorization. 2013 Decisions at 1-2. BLM determined these actions violated Sections 302 and 310 of the Federal Land Policy and Management Act of 1976, as amended (FLPMA), 43 U.S.C. §§ 1732, 1740 (2012); 43 C.F.R. § 3601.71(a), and; 43 C.F.R. § 2920.1-2(a). 2013 Decisions at 1. BLM found that the mineral and realty trespasses occurred through the "concerted acts" of the appellants.[2] 2013 Decisions at 2. BLM found that Ford d/b/a Cadence and KMI were responsible for willful trespass violations, and that RAMM and Galtar were responsible for nonwillful trespass violations. *Id.* With respect to the mineral materials trespasses, BLM demanded a total of $282,333 from all four appellants, plus an additional $3,868,800 from Ford d/b/a Cadence and KMI for their willful conduct. *Id.* at 2-3. Regarding the realty trespass, BLM demanded a total of $27,000 from the four appellants. *Id.* at 3. BLM further directed appellants to submit a plan for the removal of tailings from public lands and disposal at an authorized or otherwise lawful facility, reclamation of the site to BLM standards, and a proposed schedule, detailed cost estimate, and evidence of ability to pay for implementation of the plan. *Id.*

At issue is whether there was a trespass on the public lands, which parties are liable in trespass and responsible for willful/nonwillful trespass, and whether BLM's determinations as to damages and reclamation are in error. As discussed herein, we affirm the 2013 Decisions in part, reverse them in part, and modify them in part. We affirm, finding only RAMM, Ford d/b/a Cadence, and KMI liable in trespass on public lands, and reverse BLM, by holding that Galtar is not liable. We also affirm BLM, finding Ford d/b/a Cadence and KMI jointly and severally liable for the willful trespass, RAMM liable for nonwillful trespass, and the reclamation requirements proper. Finally, we modify the 2013 Decisions to reflect a minor adjustment to the damages amount.

II. BACKGROUND

At the time of the alleged trespass, Galtar owned a millsite on private land near Stateline, Nevada. *See* Galtar's Statement of Reasons (SOR) at 1. It has been referred to by various names, including the American Borate Company's (ABC) patented millsite, Amargosa Lathrope, Lathrop, Galtar, millsite, or Mill, but here we

[2] BLM states, "[f]or ease of discussion, BLM herein will refer to the mineral material trespass and realty trespass as simply 'trespass,' unless there is a need to distinguish between the two trespasses." Answer at 7. For purposes of this disposition, we adopt the same practice.

refer to it simply as the "private millsite." *See* BLM Memorandum, "Recommendation re trespass associated with activities on the . . . patented millsite," Apr. 18, 2013 ("Trespass Memo.") at 1.

On October 11, 2006, Galtar applied to the Nevada Division of Environmental Protection (NDEP) to transfer the existing state reclamation permit for the private millsite from ABC to Galtar. Trespass Memo. at 1. On November 7, 2006, NDEP received a personal bond and an irrevocable letter of credit, issued by Black Mountain Community Bank on behalf of Galtar, in the amount of $1,260,053 for the reclamation permit. *Id.* On December 5, 2006, NDEP reissued the reclamation permit in Galtar's name, to reclaim the private millsite consistent with the permit's conditions and the reclamation plan. *Id.* at 1-2. On December 8, 2006, Galtar took title to the private, then-shuttered millsite. Galtar's SOR at 1. Galtar had the millsite surveyed and staked out in early 2007. *See* Delta Engineering Job Work Order 10020, dated Feb. 8, 2007, which was billed to Galtar on June 6, 2007.

On October 30, 2007, Galtar executed an Option Agreement and a Purchase Agreement with Cadence,[3] for the sale of its private millsite. Letter from John M. Netzorg, Esq. (Netzorg), counsel for Galtar, to John Steiger, Esq. (Steiger), Office of the Regional Solicitor (Sept. 23, 2009), Exhibits (Exs.) 1 (Galtar-Cadence Purchase Agreement) and 2 (Cadence Option Agreement). The purchase price was $1,410,053, consisting of (a) $150,000 already paid as earnest money for an option to acquire the property, and (b) either satisfactory replacement of Galtar's irrevocable letter of credit ($1,260,053) or a "complete release from any, all and every liability" associated with the letter of credit, deed of trust, and pending obligations to the State of Nevada. Galtar-Cadence Purchase Agreement at 1-3. The Purchase Agreement provided that Cadence shall comply with the requirements of the State of Nevada for matters including permitted disturbances. *Id.* at 2. It also required Cadence to apply for and obtain its own reclamation permits and provided that in no event will Galtar close escrow unless and until its Black Mountain Community Bank letter of credit, note and deed of trust have been fully satisfied and the reclamation permit obligations fully discharged and assumed. *Id.* at 3.

On November 13, 2007, Ford entered into an agreement with KMI, in which KMI states its intent to purchase approximately 60 acres of the private millsite (along with certain personal property) for $400,000, subject to certain conditions. Letter of Netzorg to Mark Chatterton (Chatterton), BLM, Sept. 2, 2008, Attach. B: Letter from KMI to Ford, signed Nov. 13, 2007 (Ford-KMI Purchase Agreement) at 1-2. Among other provisions, the Ford-KMI Purchase Agreement provides for "KMI to fund ongoing reclamation of the 312 acres and rehabilitation of the mill . . . ." *Id.* at 2.

[3] As noted *supra,* Ford was doing business as Cadence.

On November 21, 2007, after engaging RAMM to do work on the project, Ford met, at the millsite, with Monte Brown (Brown), President of RAMM, and 5 of its employees. *See* Deposition of Brown, Jan. 22, 2009, at 75-82. As recounted by Brown, Ford was in charge and "told us what to do." *Id*. at 75; *see id.* ("I'm not getting paid to build anything per plan. Robert is directing what work is to be done."). RAMM's equipment arrived and RAMM's employees began work later that day. They continued working on the millsite when RAMM submitted a proposal to Ford for the "Armagosa Rental Work." Letter from Netzorg to Chatterton, BLM, Sept. 2, 2008, Attach. A (includes signed "Proposal and Contract, " Dec. 5, 2007 (Ford-RAMM Contract)). The Ford-RAMM Contract provides that RAMM would be paid by the hour for its equipment and operators (*e.g.*, $250/hour for a bulldozer and operator), with $108,360 to be paid by December 10, 2007, which was the total due under tickets signed by Ford for RAMM equipment and operators from November 21 through November 30, 2007 (*e.g.,* $2,750 for the 11-hour use of a D-10 Dozer on November 27, 2007). Ford accepted that proposal, executing it as "agent" for Cadence, KMI, and Galtar. *See id.* (RAMM tickets for Nov. 21, 2007, through Jan. 12, 2008, identifying the customer as KMI). On December 19, 2007, KMI paid RAMM $50,000 for work undertaken at the private millsite. Trespass Memo. at 4.

Around January 11, 2008, KMI employee William Trigger (Trigger) notified RAMM and Ford that KMI would not be responsible for any more invoices generated after January 11, 2008, and that any invoices after this date would have to be paid by Ford and "Gus Galtar." Trespass Memo. at 4. RAMM tickets for work at the Armagosa Mine from and after January 14, 2008, identified its customer as "KMI-Galtar-Cadence." In Trigger's letter, he states there is "no permit in place for this job that we are aware of"; a permit needs to be acquired before KMI would accept "further fiscal responsibility"; and there needs to be "an onsite monitor from a proper engineering firm." *Id.* On February 2, 2008, RAMM transmitted another invoice to KMI. *Id.* at 5. On February 5, 2008, RAMM recorded a notice of lien in the outstanding amount of $1,020,967.29 for the work on the private millsite. *Id.* Clarence Wagenaar, President of KMI, stated that he agreed to pay for the reclamation and agreed to pay RAMM, on behalf of KMI (technically, on behalf of "KMI/Hillcrest"). Deposition of Wagenaar, Oct. 14, 2009, at 71, 72; *see also id.* at 51. On February 22, 2008, KMI paid RAMM $100,000 by check for work undertaken at the private millsite. Trespass Memo. at 5.

On March 4, 2008, the NDEP Bureau of Mining Regulation and Reclamation (NDEP-BMRR) conducted an inspection of the private millsite. Trespass Memo. at 6. NDEP-BMRR, in a letter to Galtar, on March 6, 2008, summarized the findings of their inspection. The inspectors observed operations that included machinery placing cover material on a tailings impoundment near the Southern boundary with public lands. *Id.* In its inspection, NDEP-BMRR came across an existing landfill/dump that it

described as "may be on public . . . (BLM) land, south of the mill adjacent to the southern edge of the South tailings facility." *Id.* On March 13, 2008, NDEP-BMRR sent a letter to Galtar, requiring the suspension of all earthwork and covering activities of the tailing impoundments. *Id.* at 7. On March 17, 2008, a Galtar employee faxed an "URGENT" message to Brown (President of RAMM) regarding "work @ Amargosa," stating, "You must stop all work effective[] immediately until further notice." *Id.*

On March 27, 2008, Galtar and Ford d/b/a Cadence signed an addendum to their purchase agreement for the private millsite, stating Cadence wanted to acquire all of Galtar's remaining interest in the private millsite ant that it would pay for "all reclamation and environmental work pending, completed or to be completed from or after November 15, 2007," including "any, all and every expense." Trespass Memo. at 7. It reports the sales price is substantially reduced in order to compensate Cadence for liabilities it assumed (*i.e.,* "all third party claims including, but not limited to RAMM Construction, Delta Engineering, Inc. [Delta], Robert Ford, and any, all and every other claim arising from or related to the Amargosa Property." *Id.*

Galtar hired Robison Engineer Company (Robison Co.) to conduct measurements of land surface affected by the disturbance. Trespass Memo. at 7. Robison Co. prepared a map, dated April 9, 2008, showing the private millsite, existing tailings ponds on the millsite, and the extent of surface disturbance outside the boundaries of the "private land holdings." *Id*. at 8. The map indicates it was "prepared for Cadence . . . ." *Id.* On April 10, 2008, Robison Co. met with NDEP to discuss the activities taking place on public lands, and a BLM inspector – David Fanning (Fanning) – participated by teleconference. *Id.* On that date Robison Co. followed up the meeting with an e-mail to Fanning, which was copied to NDEP, stating that Robison Co. would be preparing a corrective action plan for the fencing and completion of coverage and grading of tailings and a reclamation cost estimate for completing any outstanding earthwork. *Id.*

On April 14-15, 2008, BLM inspectors Fanning and George Varhalmi (Varhalmi), accompanied by NDEP-BMRR, investigated the site and determined that 38.5 acres of public lands had been excavated to a depth of 18-20 feet. Trespass Memo. at 8. The BLM inspectors found trenches, which appeared to be constructed to hold tailings. Two excavated trenches were completely filled with tailings and one was partially filled. *Id.* They reported personnel conducting earth-moving operations in the vicinity of the boundary between the private millsite and the public lands to the south. *Id.* at 9. They found approximately six scrapers, one bulldozer, and one water truck employed on or in the vicinity of public lands. *Id.*

At the time of the activities in question, Ford and KMI were listed as "managers," under the officers section, on the Nevada Secretary of State internet site.[4] Trespass Memo. at 9; *see* hardcopy printout regarding Cadence, from Nevada Secretary of State website, Apr. 17, 2008.

During an inspection on April 14, 2008, NDEP-BMRR observed that RAMM was generating large amounts of fugitive dust, which was not adequately controlled by the single water truck at the site. Trespass Memo. at 9. NDEP-BMRR also determined there was no State of Nevada air quality operating permit on site. *Id.* On April 15, 2008, NDEP advised Galtar to stop operation of all equipment on the private millsite, except the use of water trucks to control fugitive dust. *Id.* On April 18, 2008, Galtar informed RAMM "due to not having [a] dust permit[, that] only [a] water truck can be used at [the] job site." *Id.* On that date, Galtar applied to NDEP for an air quality operating permit for a surface area disturbance covering 393 acres. *Id.* NDEP later issued notices of air quality violations to Galtar for failing to control fugitive dust on April 14 and 18, 2008, and for its failure to obtain an air quality operating permit. *Id.* at 10.

On May 6, 2008, BLM issued a suspension order to Galtar and Ford, regarding unauthorized operations on public lands. Trespass Memo. at 9. BLM stated its findings that Galtar and Ford have disturbed 38.5 acres of public lands, pushed wet tailings from private to public lands, and excavated a significant amount of mineral materials to cover the borate tailings, and that these actions constitute a trespass. *Id.* BLM directed the immediate cessation of all activities that would cause further disturbance on public lands and further directed that fencing and warning signs be placed around the tailings to protect the public. *Id.*

On May 22, 2008, NDEP-BMRR issued a notice of noncompliance (NoN) to Galtar because of what it described as a failure to follow the approved reclamation plan and a recently discovered disturbance outside of the approved permit boundary onto public lands administered by BLM. Trespass Memo. at 11. In its NoN, NDEP-BMRR found that, after apparently running out of cover material on patented land, RAMM proceeded to obtain cover material from public lands. *Id.* It found no authorization from BLM or NDEP approval to clear and obtain material from the adjacent public lands south of the Southern impoundment, and further found that, since the March 4, 2008, inspection, trenches had been dug on the stripped BLM land, where tailings

[4] As of May 8, 2008, Ford and KMI's names had been removed from the list of Cadence's managers on the Secretary of State website. *See* hardcopy printout of Secretary of State webpage for Cadence Industries I, LLC, May 8, 2013; *see also* Trespass Memo. at 10.

material had been directed (via the trenches) into an excavated basin, in order to dry and alleviate the swelling tailings in the South impoundment. *Id.*

Galtar responded, on May 27, 2008, denying liability for trespass onto the public lands. Trespass Memo. at 11-12 Galtar took actions to mitigate the situation, by contracting for installation of fencing and signage, and by retaining Robison Co. to prepare a modification to the reclamation plan, to include remediation of any additional disturbances on public lands. *Id.* BLM later found that the fences and signage were adequate for public safety. *Id.* at 13.

On June 9, 2008, Robison Co. finalized a map showing a tailings pond #3 of 7.9 acres and a "Public Borrow Area" of 30.8 acres in size in the area where BLM found there to be a trespass. Trespass Memo. at 12. On July 1, 2008, Robison Co. responded to a BLM request for calculation of the volume of material removed from public lands by estimating that 462,885 cy were removed to cover tailings ponds. *Id.* at 13. Robison Co. based its estimate on previous topography digitized from earlier mapping, compared to the current land surface (to the projected base of the tailings ponds excavated on public lands). E-mail, Robison to Fanning, BLM, July 1, 2008.

Thereafter, on various dates including September 2, 2008, Galtar consistently asserted to BLM that it had undertaken to stake the millsite, had not authorized anyone to trespass on public lands, and believed that RAMM, acting under contract with Cadence and/or others outside the direct control of Galtar, were responsible for the trespass. Trespass Memo. at 14. Galtar further maintained it played no active role in the reclamation efforts performed by Cadence, and that Galtar first learned of the activities on the site from NDEP, on March 6, 2008, and immediately notified Cadence and RAMM to suspend operations. *Id.* at 15.

On September 17, 2008, BLM issued two trespass decisions to Galtar, determining that it committed a mineral materials trespass by removing 463,885 cy of mineral materials from the public lands, and a realty trespass by placing tailings onto public lands, and demanding damages for the trespasses and a reclamation plan. Trespass Memo. at 15. Galtar appealed and petitioned for stay with the Board. Shortly thereafter, upon the request of BLM and Galtar, the Board suspended the appeal proceedings. *Id.* at 16. On December 1, 2009, BLM issued trespass notices to Ford d/b/a Cadence, KMI, and RAMM. *Id.* at 18. Over the next several years, litigation and/or arbitration ensued, involving Galtar, RAMM, Ford d/b/a Cadence, and/or KMI, over activities that took place to reclaim the ABC millsite, and issues involving responsibility for public lands trespass. *See id.* at 17-18, 21-25; Answer at 7-8. In May 2013, following review of information collected during its investigation, BLM requested the Board vacate BLM's September 17, 2008, trespass

decisions against Galtar, returning to BLM jurisdiction to issue new decisions. Answer at 6. The Board granted that motion.

On May 8, 2013, BLM issued separate decisions to Galtar, RAMM, Ford d/b/a Cadence, and KMI for mineral materials trespass and realty trespass. *See* 2013 Decisions. BLM determined Galtar and RAMM committed nonwillful trespass for both the removal of mineral materials and the placement of tailings on public lands, but that Ford d/b/a Cadence and KMI committed such acts in willful trespass. BLM assessed damages of $282,333 for the nonwillful violations, and an additional $3,868,800 for the willful violations. BLM held the appellants jointly and severally liable for their respective degrees of culpability, for their "concerted acts." Appellants appealed and petitioned for stay of BLM's 2013 Decisions.[5]

III. ANALYSIS

The appeal raises several issues: (1) whether there was a trespass on public lands; (2) which of the appellants are liable in trespass; (3) whether each responsible appellant was liable for a willful or nonwillful trespass; (4) whether BLM properly determined the amount of material involved in the trespass (which affects the damages calculation); and (5) whether the reclamation requirements of the 2013 Decisions were made in error.

A. The Trespass Activities Occurred on Public Lands

Pursuant to FLPMA, as amended, 43 U.S.C. §§ 1732, 1740 (2012), BLM promulgated regulations, prohibiting mineral materials trespass and realty trespass. The mineral materials trespass rule, 43 C.F.R. § 3601.71(a), provides that a person must not extract, sever, or remove mineral materials from public lands, unless BLM or another Federal agency with jurisdiction authorizes the removal by sale or permit. The realty trespass rule, 43 C.F.R. § 2920.1-2(a), provides that any use, occupancy, or development of the public lands, without authorization, other than casual use, shall be considered a trespass. A trespass on public lands may be unintentional (*e.g.*, even a bona fide but mistaken belief about the boundaries between public and private lands is not a defense to a nonwillful trespass. *See Kenneth Snow & Richard Halliburton,* 153 IBLA 371, 377 (2000); *see also Linn and Treciafaye Blancett,* 178 IBLA 272, 294 (2009).

[5] On May 19, 2015, the Board issued an order directing KMI and Galtar to provide a transcript of the May 11, 2009, deposition of Trigger, which they cited in their SORs.

In its 2013 Decisions, BLM determined that the unauthorized removal of 463,885 cy of mineral materials from public lands constituted a mineral materials trespass. 2013 Decisions at 1. BLM also determined that unauthorized excavations on 38.5 acres of public lands and the partial filling of those excavations with tailings constituted a realty trespass. *Id.* at 2.

Ford, RAMM, and KMI contend there was no trespass, because the alleged violations occurred at the private millsite, rather than on public lands. Ford argues (1) BLM improperly relied upon a purported survey conducted by Robison Co.; (2) BLM improperly accepted Galtar's claim that it obtained a survey of the private millsite, by Delta; (3) BLM improperly based its ruling on its misperception that Ford lacked credibility, but did not view Galtar as lacking credibility; and (4) BLM improperly rejected Ford's evidence that there was no trespass. RAMM and KMI assert that title records show the area of alleged trespass is actually private land. However, as discussed below, after a thorough review of the record and pleadings, the Board finds that the activities alleged in the 2013 Decisions occurred on public lands, and therefore that a trespass occurred.

On April 14-15, 2008, BLM geologists Fanning and Varhalmi inspected the alleged trespass area and met with Kevin Sullivan, of NDEP, and Nathan Earl Robison of Robison Co., who was retained by Galtar and Cadence.[6] BLM Answer, Decl. of Fanning ¶ 5. Robison and Sullivan showed BLM the private/public boundary between the trespass area and the public lands, which was marked by a line of survey laths. *See id.* BLM observed excavated trenches, some of which were filled with tailings. *Id.* Just north of that area, on what BLM describes as the private millsite, they observed heavy machinery moving dirt and capping tailings. *Id.* Based on the relatively fresh appearance of the pits and wet tailings, and his 38 years of experience, Fanning concluded that the excavations and placement of the tailings were no more than a few months old. *Id.* ¶¶ 1-2, 5.

Inspecting the site on April 14, 2008, Varhalmi recorded the new disturbance, using the boundary line marked with the survey lath as its northern border, and taking GPS coordinates of the trespass area. Decl. of Fanning ¶ 7. He created a shapefile and map for the disturbance. *Id.*; "American Borate Trespass as of 4/15/08" Map, created by Varhalmi on Apr. 16, 2008 (Varhalmi's Map). The next day, Varhalmi repeated the exercise to ensure he had correctly spatially recorded the geographic information system (GIS) data. Decl. of Fanning ¶ 7. Varhalmi later prepared a map in GIS software with the disturbance shape file overlapping an aerial photograph of the area with land status. *Id.* This process resulted in contrasting the aerial photograph

[6] Robison is a registered Professional Engineer (PE) with the state of Nevada and has consulted with NDEP in their dealings with mining projects. Decl. of Fanning & 12.

of the area before the disturbance with the trenches, excavation and tailings in the trespass area that were observed on April 14-15, 2008. *See id.* Varhalmi's Map indicates the trespass area is 38.25 acres. *See* Varhalmi's Map.

On November 25, 2008, BLM met with representatives of Cadence (Ford), RAMM, and KMI. Memo. to File, from Fanning, "Galtar/Cadence Trespass Meeting" (Trespass Meeting, Nov. 25, 2008); Decl. of Fanning ¶ 10. Ford presented a Master Title Plat (MTP) and Historical Index (HI), which Fanning explained.[7] Ford's Sept. 4, 2013 SOR; Trespass Meeting, Nov. 25, 2008, at unpublished (unp.) 2; Decl. of Fanning ¶ 10. Fanning found that the MTP and index indicated that the disturbance occurred on public lands. Trespass Meeting, Nov. 25, 2008, at unp. 2. Fanning compared Varhalmi's Map of the trespass area and its legal description with the MTP and HI, to demonstrate that a trespass occurred. Decl. of Fanning ¶ 10. The group was joined by Brenda Wilhight , a BLM realty specialist, who researched the land status and produced a copy of the millsite patent issued to ABC. Trespass Meeting, Nov. 25, 2008, at unp. 2. She showed the group that the patented area did not include the trespass area. *Id.* According to BLM, at that point, the meeting participants agreed the trespass area is on public lands.[8] Answer at 12 (citing Trespass Meeting, Nov. 25, 2008, at unp. 2.) BLM participants estimated the area of disturbance on public lands was approximately 38.5 acres. Trespass Meeting, Nov. 25, 2008, at unp. 2.

Robison's maps also corroborate BLM's trespass determination. Robison prepared a map, dated April 8, 2008, for Cadence, and another dated June 9, 2008, for Galtar. The maps identify the trespass area as a "Public Borrow Area" and a tailings pond, south of a "Boundary of Current Private Land Holdings." In addition, Robison's map dated September 9, 2008, identifies the same boundaries. Robison based those maps on observations made on March 31, 2008, April 1, 2008, and June 5, 2008, the BLM Geographic Coordinate Database, and the ABC May 21, 1980, Property Boundary Map. *See* Robison's Maps.

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[7] The MTP depicts current land status on a particular township, and the HI chronologically lists all actions that affect the use of title to public lands and resources for each township. Decl. of Fanning & 10.

[8] After reviewing the Cow County Title Company's preliminary title report for the area, which Ford produced at the Nov. 25, 2008, meeting, Fanning found it did not include Lots 44 and 53 (*i.e.*, the disputed area). Trespass Meeting, Nov. 25, 2008, at unp. 2; Administrative Record (Admin. Rec.), Volume (Vol.) 2, Cow County Preliminary Report, June 16, 2006, at 2 (Fanning's handwritten notes, undated).

Ford points to a May 15, 2012, letter from E&M Enterprises, Inc. (E&M) to the U.S. Department of the Interior (DOI). E&M was hired to perform reclamation work at the private millsite from 2007 through 2008. *See* Admin. Rec., Vol. 2.5, enterprisesinc050412.pdf, E&M Letter (May 15, 2012). Ford claims that the letter and attached map, dated January 22, 2008, shows the area in question was already disturbed in 2007--prior to the alleged trespass. *Id.* We cannot discern whether or not it reflects disturbance in the subject area. Its crudely hand-drawn map lacks notations identifying a disturbed area. *See id.* In addition, the letter lacks any explanatory details supporting E&M's claim that the map shows a previous disturbance. *See id.* In any event, the January 22, 2008, map cannot support a claim that the area in question was already disturbed in 2007--prior to the alleged trespass--because, according to its date, it was prepared 2 months after RAMM's onsite work began in November 2007. *See id.;* RAMM's Invoices, Dec. 2007.

Ford and RAMM claim Tom Arnhart (Arnhart) of Cow County Title agreed with them that the area in question is located on the private millsite. RAMM SOR at 4.[9] Ford asks the Board to give weight to an August 5, 2011, e-mail from Arnhart, but that e-mail is not part of the administrative record, and Ford has not provided a copy of it to the Board.[10] *See* Ford's Sept. 4, 2013, SOR at 18.

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[9] RAMM does not cite to any particular document of Arnhart, but may be referring to an e-mail response, sent Dec. 2, 2008, from Arnhart to Ford. *See* Admin. Rec., Vol. 2.5, emailsfordplan_cowtitle053112.pdf, E-Mail, Arnhart to Ford, Dec. 2, 2008 (Arnhart 2008 E-Mail). Arnhart stated the South tailing pond, as delineated on "the map" (presumably, the MTP maps) is primarily in the Northwest Quarter of Section 1, which was patented. *Id.* ("It also appears the pond may encroach into Section 36 Township 17 South Range 49 East, which is also patented . . . ."). However, his e-mail does not explain the basis for his interpretation of the MTP maps, nor does it explain how BLM erred. Looking at the MTP maps, we are unable to confirm Arnhart's view. *See* Admin. Rec., Vol. 1, MTP maps. We also note that Galtar, who owns the private millsite, agrees with BLM that the area in question was not part of its property, but instead was public land. *See* Galtar's SOR at 4, 5, 8, 10, 12.

[10] Ford d/b/a Cadence provided hardcopy attachments to his SORs, but none of those includes the Aug. 5, 2011, Arnhart e-mail. Ford does not explain to whom the e-mail was addressed or whether it was sent or forwarded to BLM. Ford also filed voluminous electronic documents with the Board, without including an index of those documents. We have been unable to locate the subject e-mail amongst those electronic documents. We assume BLM did not receive a copy of the e-mail in question, since it is not part of the administrative record, which BLM filed with the Board.

The Board finds the weight of the evidence clearly shows the area in question, disturbed by the activities described in the decisions, encompasses public lands. We find Varhalmi's map, corroborated by Robison's maps, persuasive. Ford's report of Arnhart's purported assertion, in a missing August 5, 2011, e-mail, that the area in question is part of the private millsite, is of no probative value, and the statement, attributed to Arnhart, is contradicted by the MTP maps, and not otherwise supported in the record. *See* Admin. Rec., Vol. 1, MTP maps. Furthermore, as it is clear from our examination of the ABC patents that they do not include lots 44 and 53, the site of the trespasses, they too fail to support appellants' claim. *See* Admin. Rec., Vol. 1, ABC Patent No. 27-2000-0064. Admin. Rec., Vol. 2, Cow County Preliminary Report, June 16, 2006, at 2 (Fanning's handwritten notes, undated). Finally, we find no evidentiary support, in the record or supplied on appeal by appellants, for the assertion that the area was disturbed prior to the alleged trespasses. Appellants' unsupported allegations are insufficient to show error in BLM's decisions.

The regulation at 43 C.F.R. § 3601.71(a), prohibits the extraction, severance, or removal of mineral materials from public lands under the jurisdiction of DOI, unless BLM or another Federal agency with jurisdiction authorizes their removal by sale or permit. BLM's determination that the activities at issue were unauthorized is unrefuted. We, therefore, find that the unauthorized removal of mineral materials from public lands was an unauthorized use, prohibited under 43 C.F.R. § 3601.71(a).

In addition, the matter before us includes not only the excavation, extraction, and removal of mineral materials from the public lands, but also the deposit and disposal of tailings from private lands (the private millsite) onto the public lands. As discussed *supra,* the removal of mineral materials from public lands constituted a mineral materials trespass. *See* 43 C.F.R. § 3601.71(a). Furthermore, the deposit and disposal of tailings from private property onto the public lands constituted a realty trespass. *See* 43 C.F.R. § 2920.1-2(a). We, therefore, conclude that BLM properly found both a mineral materials and a realty trespass under the circumstances here presented.

B. Which Parties Are Liable for the Trespass

Having established that there was a mineral materials and realty trespass on public lands, we turn now to the issue of which parties are liable in trespass.

1. RAMM, Ford d/b/a Cadence, and KMI – Liable

RAMM disclaims responsibility for any trespass, arguing it was neither the reclamation project contractor, nor supervisor. RAMM SOR at 2-3. RAMM asserts its work was conducted at the direction of Ford and/or others and that it merely leased equipment and operators to Ford and/or others. *Id.* at 2-4. RAMM contends it is not

properly held liable for the trespass of employees leased by Ford, arguing that "leased employees are often considered the common law employees of the client company." *Id.* at 4 (citing, *Independent Contractors, Leased Employees and Other Contingent Workers,* 47 No. 2 Prac. Law. 23 (Mar. 2001)); *but see Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323 (1992) (20-point test for determining whether an employee is a common law employee of another).

From our reading of the record and the RAMM proposal accepted by Ford (as agent for Cadence, KMI, and Galtar), we find RAMM rented equipment with operators to perform work at the "Armagosa Mine" and provided Ford no other services, nor undertook other activities regarding the reclamation project. *See* Trespass Memo. at 27. There is no evidence that Brown knew RAMM equipment was operating beyond the boundaries of the millsite; no evidence showing he or any other official of RAMM were managing or otherwise responsible for that work; and no evidence that they knew or should have known that required Federal authorizations had not been sought and obtained. *See id*. at 29. Nonetheless, Brown could have made appropriate inquiries and/or removed his equipment from the site to avoid their continuing trespasses. Since neither he nor anyone else at RAMM did so, we find RAMM liable for the trespasses committed by its employees. *See Kenneth Snow*, 153 IBLA 371, 377 (2000) ("It is no defense to a charge of unintentional trespass that the trespasser acted in the mistaken belief that he was on authorized land.").

Turning to Ford, as discussed above, he hired RAMM to carry out the project, as the two parties contractually agreed. *See* Ford-RAMM Contract. On November 12, 2007, Ford entered into an agreement with KMI regarding the project. *See* Ford-KMI Contract. RAMM's invoices from November 2007 for the private millsite list the customer name as KMI. *See* RAMM's invoices, Nov. 2007-Jan. 2008. On December 19, 2007, KMI paid RAMM $50,000 for work undertaken at the private millsite, and RAMM's invoices in December 2007 list KMI under the customer name. *See* Trespass Memo. at 4. Wagenaar, President of KMI, stated that he agreed to pay for the reclamation. Deposition of Wagenaar, Oct. 14, 2009, at 71. Wagenaar also stated he agreed to pay RAMM, on behalf of KMI (technically, on behalf of "KMI/Hillcrest"[11]). *Id.* at 72; *see also id.* at 51. In their contract, Ford and KMI agreed that Fred Johnson (Johnson), a geological engineer who had worked for ABC,[12] would direct the work and attend inspections. *See* Ford-KMI Contract at unp. 1. On January 12, 2008, an e-mail from Ford to Johnson directed Johnson to do what

[11] Hillcrest is not a party to the appeal before the Board.

[12] 2009 Trigger Deposition at 48, 63-64.

Wagenaar (President of KMI) told him to do. Letter from P. Sterling Kerr, Esq., to Patrick Putnam, Field Manager, BLM, Jan. 4, 2010, Ex. G: E-Mail forwarded from Ford to Johnson and others, Jan. 12, 2008 (E-Mail, Ford to Johnson, Jan. 12, 2008).

On April 17, 2008, just a couple of days after its inspection,[13] BLM accessed the Nevada Secretary of State's website for information regarding Cadence (specifically, Cadence Industries I, LLC), for purposes of investigating the trespass. Trespass Memo. at 9. The website showed that both Ford and KMI were managers of Cadence.[14] *See* hardcopy printout regarding Cadence, from Nevada Secretary of State website, Apr. 17, 2008.

[1] In its 2013 Decisions, BLM determined that, since appellants were acting "in concert" with each other, they were jointly and severally liable. The Board has held that, with respect to trespass, parties acting in concert, while engaged in a joint effort or enterprise, are jointly and severally liable. *Leo R. Haag, Jr. v. BLM,* 170 IBLA 320, 326-27 (2006) (citing 75 Am. Jur. 2d Trespass §§ 66, 67 (1991);[15] 4 Restatement (Second) of the Law of Torts §§ 875, 876 (1979); and also, *Curtis Sand & Gravel Co. and Estate of Clare Schweitzer,* 95 IBLA 144, 152, 94 I.D. 1, 5 (1987)); *but see Snow & Halliburton,* 153 IBLA at 376-78 (distinguishing *Curtis Sand & Gravel*). In *Haag,* the Board concluded that two people were jointly and severally liable for a trespass by fire, where they were acting in concert with each other in cleaning up a campsite, even though only one of them may have started the fire during the cleanup of the campsite. 170 IBLA at 326-27. Similarly, in another case, the Board held two people were jointly and severally liable for trespass from the construction and maintenance of a water diversion structure on public lands, in which the structure was constructed by one of the appellants on behalf of the other. *Dalton Wilson and Dan Bowman,* 156 IBLA 89, 90, 99 (2001). We find that Ford and KMI, were acting in concert with each other. The fact that Ford hired RAMM, and entered into an agreement with KMI for it to reimburse RAMM, provides strong and persuasive evidence of their joint venture. Accordingly, Ford d/b/a Cadence and KMI are jointly and severally liable for the trespass.

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[13] *See* Decl. of Fanning, describing an inspection that occurred on Apr. 14-15, 2008.

[14] As of May 8, 2008, Ford and KMI's names had been removed from the list of Cadence's managers on the Secretary of State website. *See* hardcopy printout of Secretary of State webpage for Cadence Industries I, LLC, May 8, 2013; *see also* Trespass Memo. at 10.

[15] *See also* 75 Am. Jur. 2d Trespass §§ 55, 56 (current edition, available on LEXIS®).

2. Galtar – Not Liable

The Board's trespass case law on joint and several liability provides insight as to Galtar's liability regarding the trespass. In an analogous situation, in *Snow & Halliburton,* we declined to hold a lessor liable for the trespass of a lessee where the lease only included private lands. 153 IBLA at 376-77. We noted courts have held that trespass committed by a lessee will not subject the lessor to liability where the trespass is committed on land other than that included in the lease. *Id.* at 377. In *Snow & Halliburton,* the parties' agreement included only private lands. *Id.* Their agreement also required the lessee to comply with any and all mining regulations and to indemnify the lessor for any breach or liability caused by the lessee's mining activities. *Id.* at 376. The lessee admitted removing mineral materials from the public lands, but there was no evidence the lessor ever approved the unlawful removal of the mineral materials from the public lands. *Id.* BLM argued that the lessor benefitted from the trespass because he received royalties from the mineral materials removed from public lands. However, the lessee repeatedly defaulted on royalty payments, and there was no evidence the lessee specifically paid the lessor royalties for the mineral materials removed from public lands. *Id.* at 376-77. We distinguished this case from a previous case in which we held the lessor and lessee jointly and severally liable, because the lease included the lands from which the minerals were removed. *Id.* at 377 (distinguishing, *Curtis Sand & Gravel,* 95 IBLA 144, 94 I.D. 1).

As in *Snow & Halliburton,* Galtar as the owner of the private property, entered into an agreement, which did not authorize activities on the public lands. Galtar entered into an agreement to sell, for $1,410,053, the private millsite, which it owned, to Cadence, whose managers, at the time of the trespass, were Ford and KMI.[16] *See* Galtar-Cadence Purchase Agreement at 1. Towards that amount, they agreed to apply the $150,000 Cadence was to pay for exercising the purchase option. *See id.* However, the balance of the purchase price was to be in the form of replacing Galtar's irrevocable letter of credit for the reclamation. *See id.* at 1-3.[17] By the terms of the purchase agreement, Cadence, managed by Ford and KMI, was required to either provide a satisfactory replacement for Galtar's irrevocable letter of credit, which was pledged to NDEP, or deliver to Galtar a complete release from any, all, and every

16 *See supra,* discussion citing: hardcopy printout regarding Cadence, from Nevada Secretary of State website, Apr. 17, 2008.

[17] As discussed *supra*, Galtar had obtained an irrevocable letter of credit, issued by Black Mountain Community Bank, in favor of NDEP in the amount of $1,260,053 for the reclamation permit. Trespass Memo. at 1.

liability associated with the letter of credit, as well as pending obligations to the State of Nevada. Galtar-Cadence Purchase Agreement at 2.

Under the Galtar-Cadence Purchase Agreement, Cadence was required to comply with the requirements of the State of Nevada for permitted disturbances, among other requirements. Galtar-Cadence Purchase Agreement at 2-3. Cadence was required to apply for and obtain its own reclamation permits. *Id.* at 3. The intent of the parties to that agreement was for Galtar to be released from "any, all and every obligation" under the letter of credit and the existing reclamation permit *See* Galtar-Cadence Purchase Agreement at 3. Accordingly, based on the weight of the evidence, we view Galtar's role as seeking to avoid undertaking any reclamation activities.

We find no record evidence that RAMM worked for Galtar. Ford hired RAMM, and it was Ford who entered into an agreement with KMI with respect to carrying out the reclamation activities, and KMI, which agreed to pay RAMM for the reclamation. Although Ford represented himself as an agent of Galtar, KMI and Cadence, Galtar vociferously denied Ford was its agent. Moreover, we find no evidence that Ford was even authorized to act for Galtar. *See e.g.,* Letter, from Lisa DeSantiago (DeSantiago), Galtar, to Chatteron & Fanning, BLM, Aug. 28, 2008; Ford-Cadence Contract at 1.

There is an instance in which RAMM asserted that Galtar instructed RAMM to conduct work, but this occurred within the context of a lien and related litigation from RAMM against Galtar. Letter, Brown, RAMM, to Galtar, Feb. 27, 2008, at unp. 1. Although some of RAMM's invoices for the project list Galtar as one of its clients, along with KMI and Cadence, all identify KMI as the client, and, as noted, KMI (Wagennaar) agreed to pay RAMM for its work. *See* Deposition of Wagenaar at 72; *see also id.* at 51. The record shows no instance in which Galtar paid RAMM for work, consistent with the testimony of Trigger, a KMI employee, in a 2009 deposition averring Galtar was not responsible for paying for any of the reclamation work. 2009 Trigger Deposition at 86. Accordingly, we find no evidence that RAMM worked for Galtar.

In the September 17, 2008, Decisions (2008 Decisions), appealed by Galtar, Galtar is identified as an operator with respect to the trespass. Shortly thereafter, BLM and Galtar jointly requested that the Board suspend consideration of that appeal. Years passed in which the current appellants pursued legal action against one other in State arbitration and/or litigation. BLM withdrew its original 2008 Decisions, and the Board dismissed that appeal.

BLM now asserts Galtar's remedial actions to address the trespass and other unlawful activities related to the reclamation create a strong inference that Galtar exercised a degree of control over the reclamation activities. BLM points to certain post-trespass actions, in which Galtar: (1) retained Robison to prepare reclamation plans for the trespass area; (2) arranged and apparently paid for fencing around the trespass area; (3) took actions demanded by NDEP to remedy state law violations; and (4) paid for the removal of tailings on another neighbor's private property, which was either moved or allowed to flow from Galtar's millsite. Galtar argues that, with no meaningful assistance by the other parties, Galtar alone was left to deal with the NDEP and BLM requirements.

The Board agrees with Galtar that its actions, which occurred after it was notified of the trespass, were intended to mitigate the harm and address the notices of violation, and do not constitute evidence of its culpability.[18] Shortly after NDEP notified Galtar, as the owner of the property, of the trespass, *see* Trespass Memo. at 6-7, Galtar faxed an urgent message to RAMM, instructing it to stop all activities on Galtar's property. Letter, Netzorg, counsel for Galtar, to Chatterton, BLM, Sept. 2, 2008, Attach. D: Fax from DeSantiago, Galtar, to Monte Brown (Brown), RAMM, Mar. 17, 2008. Just four days prior to that fax, NDEP-BMRR sent a letter to Galtar, requiring the suspension of all earthwork and covering activities of the tailing impoundments. *See* Trespass Memo. at 7. In light of the NDEP notice, it was prudent for Galtar, as the owner of the property, who was regulated by NDEP and BLM, to take swift action to alert RAMM.

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[18] Galtar maintained its position disavowing responsibility, in various State actions against Ford and others. *See* Vol. 2.5 of the Admin. Record: DOC794346nnyecorecorder121712.pdf. In an Arbitration Award, Ford assumed all of Galtar's liabilities (and the liabilities of Galtar's President) for the private millsite, including the RAMM litigation. Judgment, District Court, Clark County, Nevada, *Ford v. Galtar, et al.,* Dec. 4, 2012, Ex. 1, "Arbitration Award," Nov. 7, 2011, at unp. 3. The Arbitration Award further provided that in no event would Galtar (or its President) have any continuing or new liability. *Id.* It also provided that Ford or some other entity shall be substituted in the BLM litigation related to the private millsite. *Id.* Deeds from Galtar conveying the private millsite and water rights were to be recorded, transferring title to Ford's assignee, Cadence, or any other assignee, upon Ford's performance. The Board does not rely on the prior arbitration or any private litigation as evidence of the culpability of Ford d/b/a Cadence, KMI, or RAMM, with respect to the present appeal. *Accord Holland Livestock Ranch & John J. Casey,* 52 IBLA 326, 355, 88 I.D. 275, 291 (1981), *vacated on other grounds,* 543 F. Supp. 158 (D. Nev. 1982), *aff'd,* 714 F.2d 90 (9th Cir. 1983) (grazing trespass case).

Galtar fenced the property to comply with a May 6, 2008, BLM order issued to Galtar (and Ford d/b/a Cadence), requiring the fencing and posting and warning signs around the BLM portion of the south tailings area to prevent public access to the saturated tailings ponds. *See* Order, Immediate Temporary Suspension of Operations and Fencing of BLM Lands, BLM to Galtar and Ford d/b/a Cadence, May 6, 2008 (BLM's Suspension and Fencing Order) at 1-2. BLM cited the need to protect health, safety, and the environment from imminent danger or harm, and threatened that failure to comply with the order would result in civil actions and penalties. *Id.* at 2. Under such circumstances, we find Galtar's compliance does not provide probative evidence of its culpability. Moreover, Galtar's compliance and cooperation with the fencing not only satisfied BLM's public safety concerns, but also resulted in its not undertaking other enforcement actions at that time. *See* E-mail, from Fanning, BLM, to Steiger, Esq., Counsel for BLM, Oct. 27, 2008. Notwithstanding its compliance, Galtar appealed from the 2008 Decisions. *See* Galtar's Notices of Appeal of Decision, Oct. 28, 2008.

Regarding the hiring of Robison, Galtar explained to BLM that it wished to cooperate with BLM to resolve the issue quickly and had retained Robison to document the mineral materials removed from public lands. Letter, from Netzorg, counsel for Galtar, to Chatterton, BLM, Sept. 2, 2008, at unp. 1; *see also* Letter, from Merhi, Galtar, to NDEP, May 27, 2008. However, Galtar specifically pointed out that such cooperation does not constitute an admission by Galtar of any responsibility or culpability for the materials removal. *Id.* In doing so, Galtar explained that it never authorized a trespass, and that it was not in a partnership or association with the contractor, RAMM, who was chosen by the purchaser, Cadence, to conduct the work. Letter, from Netzorg, counsel for Galtar, to Chatterton, BLM, Sept. 2, 2008, at unp. 1-4; Letter, from Merhi, Galtar, to NDEP, May 27, 2008. Furthermore, when Robison provided BLM with his calculation of the amount of material removed and a map depicting the trespass area, he explained that such does not create an assumption, by Galtar, of any responsibility for the trespass. E-Mail, from Robison, to BLM and NDEP, Aug. 26, 2008.

With respect to Galtar's agreement to prepare a reclamation plan for the trespass, Galtar explained that its actions were voluntary and not intended to indicate responsibility for the past actions of the actual trespassers on public lands. E-Mail, from Del Fortner (Fortner), Galtar, to Robison and BLM, Dec. 26, 2008 (discussing remediation plan). In its 2008 Decisions, BLM had issued Galtar a trespass determination and requirement to pay penalties and prepare a reclamation plan. *See* 2008 Decisions. In exchange for Galtar submitting a reclamation plan and schedule, BLM agreed to suspend its demand for damages for the trespass, in a joint motion for suspending the Board's consideration of Galtar's appeal of BLM's 2008 Decisions. IBLA 2009-18 & 19, Joint Stipulation, Motion to Withdraw Stay Petition Without

Prejudice, and Motion to Hold Proceedings in Abeyance, Nov. 27, 2008 (Joint Motion to Suspend Board Proceedings) at 2. Notably, BLM agreed that Galtar's submission of the reclamation plan and schedule "in no event shall be interpreted or considered as an admission by [Galtar] of responsibility for the alleged trespass or the underlying obligations addressed in the plan." *Id.* In discussions leading up to the Joint Motion to Suspend Board Proceedings, Galtar explained there was pending litigation in Nevada and California State Courts, and a joint mediation, involving Galtar (as owner), RAMM, KMI and its President (Wagenaar), Cadence, and Ford would be scheduled before the end of 2008. E-Mail, from Netzorg, counsel for Galtar, to Steiger, counsel for BLM, Nov. 14, 2008.[19]

BLM also relied on findings in Galtar's settlement of an NDEP air quality violation, claiming it constitutes an admission to a trespass on public lands. On or about April 14-15, 2008, when NDEP (and BLM) were conducting an inspection, an NDEP inspector found that RAMM was generating large amounts of fugitive dust. Admin. Settlement and Order, of Notice of Alleged Air Quality Violation, Aug. 21, 2008 (Air Violation Settlement) at 1, Findings ¶ 6. NDEP confirmed that the surface disturbance activities were being conducted without a valid air quality operating permit. *Id.* On January 23, 2007, the air quality operating permit for the private millsite had expired. *Id.* ¶ 5. Although the Findings section of the Air Violation Settlement stated that RAMM was working for Galtar, it was signed only by NDEP and later incorporated into the overall settlement signed by both NDEP and Galtar. *See id.*, Findings section at unp. 3. There is a lack of corroborating evidence to support NDEP's finding, and as discussed *supra,* it was actually Ford (representing Cadence) who hired RAMM, and RAMM was paid by KMI. Another finding reads as follows: "On May 22, 2008, the NDEP-BMRR determined that Galtar was in non-compliance for creating disturbance outside of the established boundary of its Reclamation Permit onto public land." *Id.* ¶ 12. While that is a true statement of fact, NDEP determined it does not represent an admission by Galtar that it was liable in trespass. Indeed, as we discussed *supra,* Galtar contested that it was liable for the trespass on multiple occasions.

[19] Similarly, the Board agrees with Galtar that its payment for removal of tailings on a neighboring private property ("Hackbarth") lacks probative value to prove Galtar's liability for trespass on the public lands. *See* Galtar's SOR at 8. In the Hackbarth situation, Galtar mitigated an encroachment onto a neighbor's private lands. The Board does not interpret this action as either an admission or evidence of liability with respect to the trespass on public lands.

Public policy favors settlement of disputes and avoidance of litigation. *Holland Livestock,* 52 IBLA at 352-53, 88 I.D. at 290 (grazing trespass case). "[O]ften settlements are merely an indication 'that peace was bought.'" *Id.,* 52 IBLA at 353, 88 I.D. at 290. We have rejected that a settlement will, *ipso facto*, constitute an admission of culpability.[20] *Id.,* 52 IBLA at 355, 88 I.D. at 291. The Board does not find Galtar's actions to mitigate trespass, cooperate with regulatory authorities, and settle an air violation with NDEP, all undertaken while contesting liability, to be probative evidence showing it trespassed on the public lands.[21] Based on a preponderance of the evidence, we find there is insufficient evidence showing that Galtar is liable for the trespass on public lands.

C. Willful Versus Nonwillful Trespass

Appellants argue that even if the Board holds them liable for trespass, BLM erred in its 2013 Decisions in determining them to be willful violators. The stakes are high, as BLM determined the penalty for nonwillful violation to be $282,333, whereas the penalty for a willful violation is $4,151,133 (an additional $3,868,800). These are total penalty amounts, subject to joint and several liability. *See* 2013 Decisions. As discussed below, we find RAMM's trespass was nonwillful, but that Ford d/b/a Cadence and KMI, are jointly and severally liable for willful trespass.

1. Willful Mineral Materials Trespass – Nevada Law

[2] The Department has promulgated a regulation concerning the penalty for mineral materials trespass. 43 C.F.R. § 9239.0-7. The unauthorized extraction of mineral materials from public lands under the jurisdiction of the Department is an act of trespass, and trespassers are liable in damages to the United States (and will be subject to prosecution for such unlawful acts). *Id.* The measure of damages to be applied is determined under State law, unless a different rule is prescribed or

[20] In *Holland Livestock,* the Board carved out a narrow exception to that principle, however, so that an admission of liability of a previous grazing violation may be properly considered as probative of the "repeated" nature of subsequent violations. 52 IBLA at 355, 88 I.D. at 291.

[21] Distinguishable from the current matter is a scenario in which a person attempted to mitigate a trespass by returning the materials it removed to the public lands, but without BLM's approval to do so. *See Lon Thomas,* 180 IBLA 182, 209 (2010). We determined such redeposit of material on the public lands would constitute yet another trespass violation, and that those particular actions did not mitigate damages. *Id.*

authorized under Federal law. 43 C.F.R. § 9239.0-8. The trespass in this case occurred in the State of Nevada. "The Nevada courts have long recognized a distinction between 'willful trespassers' and those who 'convert [minerals] under a bona fide, but mistaken, belief that they had the right to appropriate them.'" *M.L. Petersen,* 151 IBLA 379, 386 (2000) (quoting *Patchen v. Keeley,* 14 P. 347, 353 (Nev. 1887)). "When the mineral materials are removed by a trespasser having a bona fide, but mistaken, belief that he had a right to remove it, the removal can be said to be a 'nonwillful' trespass." *Id.*

In a mineral materials trespass case, the Board has recognized that knowledge that a violation is occurring or a reckless disregard for whether a violation is occurring is essential to a finding of willfulness. *M.L. Petersen,* 151 IBLA at 387 (citing, *inter alia, Trans World Airlines, Inc. v. Thurston,* 469 U.S. 111, 126-27 (1985)). The Board found a willful trespass where the trespasser had been removing sand and gravel in Nevada, in excess of the volume limitation in the contract, because the trespasser was required to report the quantity of materials removed, but she consistently submitted grossly inaccurate, understated monthly reports to the Government, which exhibited gross indifference and reckless disregard of the legal obligations. *Id.* at 379, 387-89; *see also CM Concepts of Nevada,* 126 IBLA 134, 137-38 (1993); *Frehner Constr. Co.,* 124 IBLA 310, 315-16 (1992).

2. Part 2920 "Knowing and Willful" Realty Trespass Law

[3] With respect to a realty trespass in violation of 43 C.F.R. Part 2920 (here, unauthorized use by depositing tailings onto the public lands), BLM regulations provide different formulas for calculating penalty amounts depending on whether a violation is "nonwillful" or "knowing and willful." 43 C.F.R. § 2920.1-2(b). For Part 2920, the Department defines "knowing and willful" as follows, in 43 C.F.R. § 2920.0-5(m), to mean:

> a violation is *knowingly and willfully* committed if it constitutes the voluntary or conscious performance of an act which is prohibited or the voluntary or conscious failure to perform an act or duty that is required. The term[] does not include performances or failures to perform which are honest mistakes or which are merely inadvertent.[22]

[22] The rule continues:

> The term includes, but does not require, performances or failures to perform which result from a criminal or evil intent or from a specific intent to violate the law. The knowing or willful nature of conduct may be established by plain indifference to or reckless disregard of the requirements of law, regulations, orders, or terms of a lease. A consistent pattern of performance or

(...continued)

3. Finding of Willful Trespass

In both realty and mineral materials trespass, above, a nonwillful violation occurs due to a bona fide, accidental, or inadvertent mistake, whereas a willful violation occurs when there is an intentional trespass or the trespasser acted with reckless disregard to whether a trespass was occurring.

Appellants Ford, KMI, and RAMM contend the alleged trespass area in this case was actually private property instead of public lands, but we have held the area in question is public lands. However, as to whether trespass was willful, the question is whether they had a bona fide, but mistaken, belief that the lands were not public lands, and that they were not operating beyond the boundary of the private lands.

RAMM's president--Brown--testified that when Ford drove him around the private millsite, it was marked with "old stakes" on what Ford told him was the "boundary." Deposition of Brown, Jan. 22, 2009, at 76. (Delta had staked various lines at the private millsite at a time between February 8, 2007, and June 6, 2007.)[23] Later on, Brown said "we had Delta Engineering put up new ones [stakes], so we would know for sure where the boundary was." *Id.* Brown advised Ford to have the property resurveyed "before we start getting close to property lines." *Id.* at 81. Brown made this suggestion "to keep us both out of trouble." *Id.* at 81-82. In response to the follow-up question of whether Ford then had the property staked, Brown said yes. *Id.* Brown said Delta put up survey stakes, and they were told this is the property line, and to stay in it. *Id.* at 82. However, RAMM only rented equipment and operators to Ford and billed KMI for their work. While it may have been negligent for RAMM to allow its equipment and operators to be used on this project, we do not find RAMM did so with reckless disregard for whether its employees and equipment would trespass on the public lands. Under these circumstances, we

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(...continued)

> failure to perform also may be sufficient to establish the knowing or willful nature of the conduct, where such consistent pattern is neither the result of honest mistake or mere inadvertency. Conduct which is otherwise regarded as being knowing or willful is rendered neither accidental nor mitigated in character by the belief that the conduct is reasonable or legal.

43 C.F.R. § 2920.0-5(m).

[23] *See* Delta Invoice for ticket #10020, billed to Galtar, June 6, 2007; Job Work Order #10020, Feb. 8, 2007. Both the invoice and work order were for $1,487.50. Galtar paid the $1,487.50 bill on Jan. 23, 2008. *See* Check, from Galtar, to Delta, Jan. 23, 2008.

conclude it is liable in nonwillful trespass for the conduct of its employees, who were directed by Ford and/or KMI.

On April 14, 2008, during an inspection, Robison and NDEP's Sullivan pointed out the boundary between the private millsite and the public lands to BLM as marked by a line of survey laths. Decl. of Fanning ¶ 5. South of that line, they observed excavated pits, or trenches, some of which were filled with tailings. *Id.* Just north of that line, they observed heavy machinery moving dirt and capping tailings on the private land. *Id.* Based on the relatively fresh appearance of the pits and wet tailings (*e.g.*, BLM observed the wet tailings flowing downhill from trench to trench), BLM's (Fanning) professional judgment was that the excavations and placement of the tailings were no more than a few months old. *Id.* Ford d/b/a Cadence and KMI challenge the validity of the staked boundaries and, based on a 2012 letter from E&M, assert that area was previously disturbed. However, they have not shown they had a bona fide belief that the staked boundary was incorrect in the spring of 2008 or that they were then relying on maps showing a different boundary. We find persuasive the BLM observations on April 14, 2008, that the disturbance in the trespass area was relatively fresh (within the past few months), and that the boundary was staked. As discussed, we find the E&M letter to be wholly unpersuasive and of extremely limited evidentiary value. In any event, RAMM began work in November 2007, more than two months before E&M prepared its map on January 22, 2008. *See* RAMM's Invoices, Nov. 2007.

Trigger, who was a mining engineering consultant for KMI, indicates that in carrying out their project, the parties ran out of dirt and disregarded the property boundary to obtain material from the public lands. 2009 Trigger Deposition at 7-8. After they ran out of dirt, Trigger opined that they went out into the desert on the southwest corner of the private millsite's tailing pond, pointing to the map. *Id.* at 120-22. Trigger expressed his opinion that, if he were the operator and were working in the desert, instead of at the tailings pond, he would have been concerned with getting charged with trespass. *Id.*

Trigger agreed that before a person starts a project, he would want to know, as an operator, where the owner's property boundary was located. *Id.* at 116. Trigger testified that Ford had the coordinates of the private millsite *Id.* at 118-19. In response to the question of whether Ford and RAMM could tell whether they were going beyond the boundary lines, Trigger said, "Oh, for sure." *Id.* at 119. Trigger testified that with his global positioning system (GPS) device and a map, he could have found the property lines within inches, since they had the coordinates. *Id.* at 152-53.

Trigger also stated, in his opinion, that they went "too far, way too far," beyond the boundary lines. *Id.* at 119.[24]

[4] The Board concludes that the trespassers (Ford d/b/a Cadence, and KMI) committed a willful violation, based on the following. As discussed above, Delta had staked boundaries for the property. Nevertheless, the trespassers went beyond that

[24] Appellants complain that Trigger was taken "out of the loop," and therefore question his basis to provide testimony. Indeed, eventually KMI's President, Wagenaar, did take him "out of the loop," after Trigger complained about RAMM's competence. 2009 Trigger Deposition at 121-22, 199. However, the Board finds Trigger's involvement with the project to that point provided sufficient time and opportunity to make the observations on which he testified.

KMI casts aspersions on the credibility of Trigger. In Trigger's April 19, 2011, Deposition (2011 Trigger Deposition), Trigger stated that in the previous month, March of 2011, KMI (specifically, KMI's President, Wagenaar), cancelled his health insurance without notifying him while he was ongoing treatments for a health condition. 2011 Trigger Deposition at 5, 23-24. At the time of the 2011 deposition, Trigger no longer worked for KMI; Trigger says he resigned, but KMI disputed the latter. *See id.* at 5, 48-50, 74.

We view Trigger's 2011 deposition as consistent with his 2009 deposition, to the extent he testified that there was a trespass. However, in 2009, he appeared to blame only RAMM and Ford with respect to the trespass, for them going into the desert--*i.e.*, the public lands--after running out of dirt for the project. Trigger's criticism of KMI in 2009 was limited to, at most, pointing out that KMI's President, Wagenaar, had removed him from the project after he complained about RAMM. In contrast, there is a point in the 2011 deposition in which Trigger added significant testimony against KMI's President, Wagenaar. Trigger asserted that when the job came to a halt because there was not enough fill, he was asked to phone contractors for fill prices. 2011 Trigger Deposition at 24-25. Trigger further asserted that when the prices for the fill were "astronomical," Wagenaar told Ford, "in a very heated conversation from KMI to 'just go out into the desert and get the dirt.'" *Id.* Although Trigger claimed he had telephone records for his calls to fill contractors, *id.* at 25, asking for prices, those do not appear to be in record before the Board. Trigger also mentioned having a diary or notes of conversations, *id.* at 45, 58, 74-75, 88, but those also do not appear to be in the record before the Board. The Board gives no weight to Trigger's 2011 assertion that KMI told Ford to go out into the desert, after receiving astronomical prices for the fill. However, we find the remainder of Trigger's 2011 testimony to be largely consistent with his 2009 testimony. Regardless, even absent the latter statement, as discussed below, we conclude there was a willful violation by the trespassers.

marked boundary, which was still present even on BLM's inspection on April 14, 2008. The parties either had the coordinates for the property boundaries, or easily could have obtained those coordinates, and could have easily detected the exact location of the boundaries with a GPS device. At a minimum, Ford and/or KMI acted with reckless disregard of the boundary, and, therefore, are liable for a willful mineral materials trespass and a knowing and a willful realty trespass. *Accord M.L. Petersen,* 151 IBLA at 387; *CM Concepts of Nevada,* 126 IBLA at 137-38; *Frehner Constr. Co.,* 124 IBLA at 315-16 (mineral materials trespass cases in Nevada); 43 C.F.R. § 2920.0-5(m) (Part 2920 realty trespass –definition of "knowing and willful" violation).

In accordance with Board precedent, which holds parties jointly and severally liable when acting "in concert" with each other (*Haag,* 170 IBLA at 326-27; *see also Wilson,* 156 IBLA at 90, 99), and our finding that they did indeed act in concert with each other, in their joint project, as we discussed, we hold Ford d/b/a Cadence and KMI, jointly and severally liable for the willful trespass. Either could have detected where the boundary lines of the property were located, based on GPS coordinates and maps, and yet they recklessly disregarded the boundary and allowed the project to go beyond the private millsite, onto the Federal lands.

D. Damages Calculation Issues

RAMM disputes the amount of mineral materials taken in the trespass as 463,885 cy. RAMM contends Robison's estimates were excessively high as a result of faulty methodology. RAMM's SOR at 4. Furthermore, RAMM asserts that Robison's estimates are not supported by any evidence, as there are no surveys of the public lands before the trespass occurred. *Id.*

[5] Appellants challenging BLM's calculation of the amount of material taken in trespass bear the burden to show, by a preponderance of the evidence, error in the data, methodology, analysis, or conclusion of the experts upon which BLM relies. *See Lon Thomas,* 180 IBLA at 190. Moreover, appellants' burden is to demonstrate, with objective evidence, either that BLM erred when collecting the underlying data, when interpreting that data, or when reaching the conclusion, or that a demonstrably more accurate study has disclosed a contrary result. *Id.* (citing *West Cow Creek Permittees v. BLM,* 142 IBLA 224, 238 (1998); *Richard C. Nielson,* 129 IBLA 316, 325 (1994); *Pine Grove Farms,* 126 IBLA 269, 274 (1993)). Conclusory allegations of error or a mere difference of professional opinion will not suffice to show BLM erred in its calculation of the amount of material taken in trespass. *Id.* at 190-91 (citing *West Cow Creek,* 142 IBLA at 238; *Nielson,* 129 IBLA at 325). Above all, appellants must show not just that the results of BLM's analysis and conclusion could be in error, but that they are erroneous. *Id.* at 191 (citing *West Cow Creek,* 142 IBLA at 238).

Significantly, RAMM did not cite to the record, or any other evidence to support its bald assertion that the calculation was faulty. Nor did RAMM offer its own estimate of the amount of materials removed. BLM generally defends the calculation, but notes a relatively minor error, in that amount of mineral materials taken in the trespass should have been 462,885 cy, instead of 463,885 cy. Answer at 14; Decl. of Fanning ¶¶ 17-18. Accordingly, BLM re-calculated the damages to be a total of $3,860,461 instead of $3,868,800 for the willful violation portion of the damages and $263,844 instead of $264,414 for the nonwillful portion of the violations. Decl. of Fanning ¶ 18. With this adjustment, the total penalty would be $4,124,305, instead of the $4,133,214 identified by BLM in the 2013 Decisions. We so modify the 2013 Decisions.

Robison provided BLM with calculations of the amount of material removed. *See, e.g.,* Decl. of Fanning ¶¶ 11-17. BLM accepted Robison's estimate of 462,885 cy, and notes that Robison had at various times estimated the volume to be between 450,000 and 465,487 cy. *Id.* ¶¶ 11-12. Besides taking into account Robison's expertise and positive professional reputation, BLM also recognized that Robison knew the depths of the filled and unfilled trenches and stated he had knowledge of previous topography digitized from early mapping. *Id.* ¶ 13. BLM states that Robison used generally-accepted engineering principles in calculating the volume of materials removed. *Id.* BLM also took its own measurements to insure that Robison was "in the ball park." *Id.* ¶ 15. By BLM's own "rough" measurements and calculations, BLM arrived at a total volume of 492,712 cy, which was approximately 6% higher than Robison's calculation, which confirmed their confidence in Robison's figure. *Id.* BLM believes the number is possibly low, as they did not take into account the swell factor of excavated material once removed from the ground, which can be as much as 10-20% more. *Id.* ¶ 16. We conclude that neither RAMM nor any other appellant has demonstrated that Robison's calculations, verified by BLM, are unreliable. Appellants have not met their burden to show error.

E. Miscellaneous: Reclamation Requirements

The 2013 Decisions require one or more of the trespassers to submit a plan, by a Nevada state licensed engineering firm, for the removal of tailings from the public lands and disposal at an authorized or otherwise lawful facility and for reclamation of the site to BLM standards. 2013 Decisions at 3. BLM also required a proposed schedule for undertaking the activities set forth in the plan, a detailed cost estimate to implement the plan, and objective evidence of the ability to pay for timely implementation of that plan. *Id.*

KMI contends BLM's 2013 Decisions would go against the public interest by harming and potentially stopping an agreement it asserts was entered into by and between Ford and BLM on or about August 20, 2012. KMI's SOR at 6. KMI contends

the 2013 Decisions would "put a block" on Ford to carry out, finance, and finalize the provisions contained in an August 20, 2012, letter, from Audrey Asselin (Asselin), BLM, to Erika Schumacher (Schumacher), Field Office Manager, BLM (BLM Letter, Aug. 20, 2012). KMI SOR at 6 (citing BLM Letter, Aug. 20, 2012). Ford also asserts he reached an agreement with BLM, in which Ford would have 2 years to complete remedial efforts on the property. Ford's Sept. 4, 2013, SOR at 20. Ford argues he should "Be Allowed to Remedy the Alleged Trespass." *Id.*

In the August 20, 2012, internal BLM letter, Asselin states she has reviewed Ford's *proposal* to hire a civil and environmental engineer for the site (referring to the trespass site) and to provide a report with recommendations on how to best meet BLM's requirements for reclamation of trespassed lands. BLM Letter, Aug. 20, 2012 (emphasis added). She *recommends* that the final design include all elements of the concept plan Ford submitted. *Id.* A conversation record on August 21, 2012, reflects that BLM (Fanning) reviewed information Ford submitted for his reclamation plan, but there is no evidence of Ford having achieved definitive approval: "I reviewed the additional information required for the reclamation plan with Mr. Ford before BLM will give final approval to start reclamation." *See* Conversation Record, Fanning (BLM) and Ford, Aug. 21, 2012.

Having searched the record for an agreement dated on or about August 20, 2012, the Board agrees with BLM that there is no record of an agreement showing it approved Ford's proposal and recommendation.[25] Although Ford alluded to an agreement, he did not provide a copy. *See* Ford's Sept. 4, 2013, SOR at 20-21. Ford reserved a right to supplement his SOR with further information about the agreement, but has not done so. There is no evidence that BLM reached an agreement. In any event, if Ford wishes to undertake reclamation, he may submit a plan to BLM for its consideration regardless of whether this appeal goes forward. Answer at 30. BLM said they would keep the Board fully apprised, as appropriate. *Id.* The parties have submitted no such updates. Accordingly, the Board affirms the reclamation requirements of BLM's 2013 Decisions.

Pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the 2013 Decisions appealed from are affirmed in part, reversed in part, and modified in part. We affirm BLM's determinations that a mineral materials trespass, in violation of 43 C.F.R. § 3601.71(a), and a realty trespass, in violation of 43 C.F.R. § 2920.1-2(a), occurred. However, we reverse BLM's determination that Galtar is liable for such trespass. We

[25] BLM stated "no such agreement exists." Answer at 30.

affirm BLM, determining RAMM to be a nonwillful violator, and Ford d/b/a Cadence and KMI jointly and severally liable for willful violations. Furthermore, we modify the total penalty for the trespass, $4,124,305 (instead of $4,133,214), with the nonwillful portion of the violations being $263,844 (instead of $264,414) and the willful portion of the damages being $3,860,461 (instead of $3,868,800). Finally, we affirm the reclamation requirements of the 2013 Decisions.

/s/
Christina S. Kalavritinos
Administrative Judge

I concur:

/s/
James K. Jackson
Administrative Judge